

**CMI International Working Group
Ship Financing Security Practices – Questionnaire**

Answers submitted by the BRAZILIAN MARITIME LAW ASSOCIATION

1. MARITIME AND OTHER CONVENTIONS

1.1 Has your jurisdiction ratified the 1952 and/or the 1999 Arrest Convention or neither?

Brazil has not ratified any of the Arrest Conventions.

1.2 If your jurisdiction has not ratified either of the aforementioned conventions, what categories of claim can be brought by way of arrest¹ of a vessel?

The most appropriate term would be “embargo” instead of arrest under Brazilian Law to describe the retained of a vessel in Brazilian Port but we will use the term “arrest” throughout for convenience. Brazilian Law allows the arrest in rem of a vessel, when the creditor has the privileged credit toward the vessel, but also the arrest *in personam*, when the credit is enforceable toward the vessel owner.

For the arrest in rem, creditor must have a maritime lien over the vessel, properly constituted, according to section I of the 1926 Brussels Convention ratified by Brazil under Decree 351 of 1935. The maritime liens recognized by Brazilian Law are provided by the Commercial Code of 1850, as well as by the 1926 Brussels Convention, – which follows below:

1. Federal taxes;
2. Legal costs and expenses;
3. Claims resulting from the employment of Master, crew and ship personnel;
4. Indemnities due for salvage;
5. General Average contributions;
6. Obligations undertaken by the Captain outside the port of registry for maintenance needs or continuation of the voyage;
7. Indemnities due as a result of collisions, or any other sea accident;
8. Ship mortgages;
9. Port dues;
10. Outstanding payments due to depositaries, warehouse rentals, ship equipment;
11. Expenditures for the upkeep of the ship and her appurtenances;
12. Short delivery and cargo losses;
13. Debts arising out of the construction of the vessel;
14. Expenses incurred for repairs of the vessel and appurtenances;
15. Outstanding price of the vessel.

However, in case the arrest is filed *in personam*, the claimant shall evidence a clear and undisputable credit and prove a potential risk of frustration of such credit (*fumus boni iuris* and *periculum in mora*).

¹ The term 'arrest' is used throughout for convenience but it is acknowledged that this may not be a concept known to the laws of all jurisdictions. If in your jurisdiction the equivalent concept is attachment or something else, please briefly explain.

1.3 In particular, can arrest be made:

(a) by a mortgagee of a vessel registered under the laws of your jurisdiction?

Yes it can. In case the creditor has a maritime lien over a vessel, its credit is considered privileged if properly construed according to article I of the 1926 Brussels Convention and, therefore, the creditor may seek the arrest in rem of the vessel. All the mortgages related Brazilian vessels should be made by a public deed and afterwards registered at the Admiralty Court which is located in Rio de Janeiro..

(b) by a mortgagee of a vessel registered under the laws of a different jurisdiction?

It is not possible to register before the Brazilian Admiralty Court a mortgage over a foreign flagged vessel.

For an instrument that creates a mortgage over a foreign vessel to be valid in Brazil, some requirements must be complied with: (i) the signatories' signatures must be certified by a notary in the place of signature, and, any certification by a foreign notary, the notary's signature shall also be consularized and further sworn translated in Brazil; (ii) the document must be registered with the appropriate registry of deeds and documents in Brazil, to be valid towards third parties.

If the creditor needs to execute a mortgage over a foreign vessel, assuming such vessel is in Brazilian waters, it will be necessary to follow the referred steps required to validate foreign documents in Brazil, as well as for the enforcement of foreign judicial decisions/arbitral awards (in summary, ratification by the Superior Court of Justice, as long as certain formal requirements are met, including the absence of any provisions contrary to the Brazilian legal order, public order, national sovereignty and good moral conduct). However, this is still a controversial issue before the Brazilian Courts.

A recent decision from the Court of São Paulo (29th Civil Court –Proc 1116479-65.2014.8.26.0100) in a proceeding involving BTG- Pactual (creditor) filed an enforcement claim of USD27.391.594,01 against OSX3 Leasing B.V and requested the attachment of a FPSO owned by OSX3. Nordic Trustee who is a mortgagee of the FPSO OSX 3 due debt securities bonds issued in the capital market of Norway in the amount of USD500,000.000.00 joined lawsuit and claimed preference to the proceeds of sale of the FPSO. The São Paulo Court did not recognize the validity of the foreign mortgage among others reasons :(i) Both Bustamante Code and Brussels Convention would only apply to signatory countries and Liberia was not party to those conventions, (ii) Brazilian Admiralty Court could not register foreign vessels so the mortgagee knew the risk and it was convenient to him to opt to Liberia Flag (iii) Not applicable art 8 , Parag 1 of the Introduction Law of Civil Code that established movable assets should apply the law of the owner in this case Netherland but the fact that was not just a vessel but a plataform that would remain 20 years in Brazil change to apply the principle of “ lex rei sitae” – the law of the location of the asset which means Brazilian Law (iv) the mortgage did not evidenced the existence of international customary practice that sovereign states are obliged to reciprocally recognize the effectiveness and validity of liens over vessels of their flags and in accordance with their laws. This decision is not final and might be reverted by the Superior Court of Justice.

1.4 Has your jurisdiction ratified the 1926 and/or the 1993 Maritime Liens and Mortgages Convention or neither?

Brazil is signatory to the 1926 Liens Convention (Brussels) and to the 1993 Liens Convention (Geneva). However, Brazil has not ratified the 1993 Liens Convention but only ratified the 1926 Liens Convention. As a consequence, the 1926 Liens Convention is currently the one incorporated to Brazilian law.

1.5 If your jurisdiction has not ratified either Maritime Liens and Mortgages Convention does your jurisdiction recognize foreign maritime liens? If so what types of claim are recognised as maritime liens?

Brazil has ratified the 1926 Liens Convention and Brazilian jurisdiction does recognize maritime liens. It should be noted that Brazil also ratified the Convention on Private International Law (Bustamante Code) of Havana 1928 by Decree 18.871/1929.

Additionally, in order to be considered valid and in effect under Brazilian law, all maritime mortgages must be constituted through a public deed and registered before the Maritime Notary, Port Captainty and Admiralty Court. In this sense, to create a mortgage on a Brazilian-registered vessel, a public deed must mandatorily contain the following requirements: (i) Amount of credit (an estimate or maximum amount); (ii) Term established for repayment; (iii) Interest Rate, if any; (iv) Vessel's specifications, such as gross tonnage, deadweight and other identifying data; and (v) Vessel's Insurance Certificate.

The following maritime liens are recognized by Brazilian Law, as per item 1.2: (i) Federal taxes; (ii) Legal costs and expenses; (iii) Claims resulting from the employment of Master, crew and ship personnel; (iv) Indemnities due for salvage; (v) General Average contributions; (vi) Obligations undertaken by the Captain outside the port of registry for maintenance needs or continuation of the voyage; (vii) Indemnities due as a result of collisions, or any other sea accident; (viii) Ship mortgages; (ix) Port dues; (x) Outstanding payments due to depositaries, warehouse rentals, ship equipment; (xi) Expenditures for the upkeep of the ship and her appurtenances; (xii) Short delivery and cargo losses; (xiii) Debts arising out of the construction of the vessel; (xiv) Expenses incurred for repairs of the vessel and appurtenances; (xv) Outstanding price of the vessel.

Please note a recent decision rendered by São Paulo Court as describe in 1.3 (b).

1.6 Does the law of your jurisdiction incorporate the 1961 Hague Convention Abolishing the Requirement for Legalisation of Foreign Public Documents?

Yes, Brazil has ratified the 1961 Hague Convention, as per Decree number 8.660/2016.

2. NATURE OF THE SHIPS' REGISTER

2.1 Is the ships' register² in your jurisdiction a register of legal title?

The register of vessels in Brazil shall be made before the Admiralty Court (for vessels with gross tonnage over 100 AB). Vessels with gross tonnage less than 100 shall be register before the Port Captainty.

² The term 'ships register' means a specialist register only for ships.

The Admiralty Court is a register that grants legal title to the owner towards its vessel.

2.2 Does the ships' register in your jurisdiction (whether or not a register of legal title) provide for registration of the interest of a demise charterer in circumstances where legal title is registered in another jurisdiction (the 'underlying register').

In Brazil, the Admiralty Court only has competence to register the ownership of Brazilian-flagged vessels. Therefore, the registration of a demise charter agreement before the Admiralty Court may only happen if the vessel chartered is Brazilian flagged. In this case, not only will the charter agreement be registered before the Admiralty Court, but also before the National Agency of Waterway Transportation (ANTAQ).

However, if the legal title of the vessel is registered in another jurisdiction, i.e., the vessel has a foreign flag, the Admiralty Court will not register the interests of such charterer. In this case, there will only be a registration of the agreement before ANTAQ.

2.3 If your jurisdiction does provide for registration of the interest of a demise charterer, does it provide for registration or notation of a mortgagee registered on the underlying register?

The body competent for the registry of a maritime lien in Brazil is the Admiralty Court (after registration at the Maritime Notary). In line with the answer of item 2.2, in Brazil the Admiralty Court is only competent towards Brazilian flagged vessels. Therefore, it is not possible to register before the Admiralty Court a mortgage or any other maritime lien over a foreign flagged vessel in Brazil.

This has long been a controversial issue in Brazil. It is understood that since the Admiralty Court is not competent, such registry shall take place before the Registry of Deeds and Documents, in order to give publicity, validity and enforceability of the maritime lien over third parties.

However, this is not settled. More recently, the Court of Appeals of São Paulo rendered a decision rejecting the validity of foreign maritime liens in Brazil. See item 1.3 (b)

2.4 Does your jurisdiction allow a vessel registered in the ships register in the name of the holder of legal title also to be registered in another jurisdiction in the name of a demise charterer? If so is such registrations permitted when the vessel is subject to a mortgage registered in the ships' register in your jurisdiction and is the consent of the mortgagee required?

Brazil only accepts to register ownership of Brazilian-flag vessels, as well as bareboat charter agreements of such Brazilian vessels. However, the hypothetical registry of a demise charter agreement of a Brazilian vessel abroad will depend upon the local rules of the foreign jurisdiction.

2.5 Please describe (briefly) the criteria for registration of a vessel on the ships' register in your jurisdiction, with particular reference to eligibility or not for registration of different types of assets employed in offshore oil and gas exploration, production, processing and storage.

In order to be able to register a vessel in the Admiralty Court in Brazil the owner must be a Brazilian citizen, resident and domiciled in Brazil or a legal entity with headquarters in Brazil.

Additionally, a foreign flagged vessel may also be registered in Brazil if there is the temporary suspension of the foreign flag (in this case, the vessel will receive a provisory Brazilian flag).

Finally, the Admiralty Court is only competent to register vessels and, therefore, is not able to register different types of assets.

3. FORMALITIES FOR MORTGAGE REGISTRATION

3.1 Does a mortgage in respect of a vessel registered in your jurisdiction need to:

(a) attach documents, such as a loan agreement, evidencing the obligations secured?

Yes, in order to register a maritime mortgage, it is required the presentation of documents which evidence the existence of the obligation / credit secured.

(b) set out in detail the circumstances giving rise to a right of enforcement?

Yes, the mortgage public deed does indicate the circumstances which shall give rise to a right of enforcement.

3.2 Does a mortgage in respect of a vessel registered in your jurisdiction need to be notarised and/or legalised?

Before the ratification of the 1961 Hague Convention (Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents), it was mandatory to notarize and legalize foreign documents, in order for them to become valid in Brazil.

Brazil only in 2016 ratified the Hague Convention 1961, as per Decree n. 8660/2016. As a consequence, the Hague Convention 1961 is already in force in Brazil. In this way, for a foreign document to be valid in Brazil, it will solely and simply be necessary the issuance and attachment of the "Hague Apostille" to the referred document, which can be made by the own public notary who issued or notarized the document.

However, it should be noted that the Apostille Convention will only be in fact in effect among Brazil and its other member countries on August 14, 2016, should there be no objections to the adhesion of Brazil.

Moreover, the Brazilian National Council of Justice ("CNJ"), responsible for coordinating and regulating the application of the Apostille in Brazil, has not yet concluded the regulation of the matter. As a consequence, despite the fact that the Hague Convention 1961 is already in force in Brazil, it is still necessary to notarize and legalize foreign documents in order for them to become valid in Brazil.

3.3 What are the registry fees in order to have a mortgage registered against a vessel registered in your jurisdiction?

The registry fees vary according to the characteristics of the vessel, as well as to the State where the Notary is located. However, they tend to be very high (including taxes), since they are usually a specific percentage over the amount of the vessel. Such fees and taxes percentage are fixed annually by local law.

3.4 Is registration indefinite or is there any requirement for re-registration after a certain period?

The registration is indefinite and there is no requirement for re-registration.

3.5 In your jurisdiction is a mortgage of a vessel required to be registered only in the ships register or, in addition, in another register? If so, please give brief details.

The mortgage of a vessel, or any other maritime lien, must be registered first at the Maritime Notary and, after that, at the Admiralty Court.

4. INFORMATION CONCERNING SECURITY INTERESTS IN SHIPS

4.1 Please advise if information concerning security interests in ships registered in your jurisdiction is publicly available, and if so, how it may be obtained, including the following issues, as applicable.

(a) Does a person seeking such information need the authorization of the vessel owner to get such information?

Any person may ask for information regarding security interests in vessels registered at the Admiralty Court (it will be a request for a certificate of encumbrances, issued by the Admiralty Court). And it is not necessary to have authorization from the owner of the vessel.

(b) Does your jurisdiction certify the accuracy of the information?

Yes, the Admiralty Court certifies the accuracy of the information through the issuance of the certificate of encumbrances, which states whether there are any liens over the vessel and their basic information.

(c) How much time is generally required to obtain such information?

After the request of a certificate of encumbrances, the Admiralty Court takes approximately 1 (one) week to issue the document.

4.2 May a vessel subject to a security interest be sold by the owner prior to the release of the security interest, and if so, under what conditions or circumstances.

The owner of a vessel subject to a security interest may sell the vessel without court authorization, since the encumbrance will remain attached to the good (will follow the good, regardless of who is the owner).

The interested buyer will request documents to verify the state of the vessel and the existence of any encumbrances. And it is up to the interested buyer to buy the vessel or not, being aware of the existence of a security interest attached to the vessel.

However, it is important to highlight that, although legal there is no impediment to the owner to sell a vessel which is subject to a security interest, contracts terms may require the previous authorization to sell the vessel. This is quite common under financing contracts related to Brazilian Banks such as BNDES and Banco do Brasil, in which the financing agent will have to authorize the sale of the secured vessel by the owner.

5. ARREST OF A CHARTERED VESSEL

5.1 Does your jurisdiction allow a mortgagee to arrest vessels on bareboat charter or time charter?

Yes. If the arrest is in rem and the creditor has a privileged credit according to the 1926 Brussels Convention and the Brazilian commercial Code, the vessel can be arrested on bareboat charter or time charter. Section 494 of the Commercial Code even states that the owners and correlated parties are jointly liable for debts that the master/vessel constitutes. Under these rules, the Brazilian Courts already accepted the arrest of vessels on bareboat or time charters, despite the fact of the owner not being originally involved. However, if the arrest is filed *in personam*, i.e., related to a civil liability act attributed to the charterer, only the assets belonging to the charterer such as bunkers can be attached/arrested, reason why, in such cases..

5.2 Under the laws of your jurisdiction, could the mortgagee incur any liability in tort, delict (or similar) to charterers or cargo interests if the mortgagee arrests the vessel when it is subject to charter and/or carrying cargo (on the grounds of interfering with the contractual relationship between owner and charterer or bill of lading holder)?

If the arrest is deemed valid by the court, the owners should be responsible for any claims by the charterers. However, if the arrest is deemed to be unlawful, the arresting party may be held liable for damages caused to the owners and eventual third parties, such as charterers for wrongful arrest.

5.3 What are the procedures or requirements, if any, applied to the cargo on board a vessel that has become subject to judicial sale in your jurisdiction? Must the cargo be discharged before sale, and if so, who bears the costs and risks of such discharge?

In principle the cargo should be treated separately and discharged from the vessel. Expenses would be initially anticipated by the arresting party and could be reimbursed from the receivables of the auction of the vessel. However, if the cargo is abandoned by cargo interests, the vessel can be sold with the cargo on board, as is, where is, being important that all the circumstances are detailed in the notice of public sale that will be issued by the court prior to the judicial auction.

6. PRIORITY ISSUES BETWEEN MORTGAGES REGISTERED IN THE SHIPS' REGISTER IN YOUR JURISDICTION

6.1 Does your jurisdiction have a system of "priority notice" to enable priority to be reserved for a period before actual registration of the mortgage?

There is no system of priority notice. In order to be considered valid towards third parties (*erga omnes* effect), the mortgage must be duly registered.

6.2 Once a mortgage is registered in your jurisdiction is it possible for a subsequent mortgage to be registered without the consent of the first registered mortgagee?

There can be more than one mortgage over the same good, provided that the amount of the goods exceeds the amount of the debt of the previous mortgages and that the new mortgage indicates the existence of the previous ones. And this can happen regardless of consent of the first mortgagee,

because his right is guaranteed due to the fact that priority is determined by the time of registration. However, the first mortgage can expressly prohibit further mortgages.

6.3 When there are two or more registered mortgages what determines their priority?

Priority between mortgages over the same good is determined by the time of the registration at Admiralty Court.

6.4 Is there any doctrine of notice such that the priority of a registered mortgage is deferred to that of an earlier but unregistered mortgage of which the registered mortgagee has notice?

The mortgage must be duly registered to be valid. However, Article 1.495 of the Brazilian Civil Code provides that when it is presented to the Official Notary a mortgage which indicates the existence of a previous unregistered one, there will be a 30 days term for the interested party to proceed registration of the unregistered one. After this term, if no registration is concluded, the new mortgage will be registered and have preference.

6.5 Can a second registered mortgagee exercise enforcement remedies without the consent of the first registered mortgagee?

The second mortgagee can only exercise enforcement remedies once the first mortgagee has duly enforced his credit and has been paid (overdue). This is due to the fact that the second mortgagee has, as collateral, only the remaining amount of the asset, after the payment of the first mortgage.

6.6 Does your jurisdiction have a system for registration of security or liens other than mortgages, whether consensual or non-consensual? If so, please describe.

Yes, another category of security for vessels in Brazil would be the chattel mortgage (fiduciary alienation). The chattel mortgage is the transfer made by the debtor to the creditor's property and indirect possession of a good non-fungible or immovable property, as a guarantee of their debt, subordinated to a condition of payment of the debt – the fiduciary alienation ends when it is verified the implement of the condition.

Such maritime lien can be registered before the Admiralty Court and must be agreed between the parties (registered before the Maritime Notary and the Admiralty Court).

7. GENERAL ENFORCEMENT ISSUES

7.1 Does your jurisdiction make a distinction between the enforcement of mortgages registered under the flag of your jurisdiction and the enforcement of any other foreign mortgages?

Yes. As explained previously in item 2.3, this has long been a controversial issue in Brazil. It might be considered that a mortgage will not be valid in Brazil unless it is in accordance with all Brazilian requirements, such as the registry before the Admiralty Court, not viable for foreign vessels. Thus, one may claim that it would not be possible for the foreign mortgage to be recognized in Brazil. However, it might be sustained that provided the mortgage is in accordance with its corresponding foreign law, Brazil should also admit its validity. But this is a line of interpretation and this issue is still controversial.

Another argument commonly used is that since the Admiralty Court is not competent, such registry shall take place before the Registry of Deeds and Documents, in order to give publicity, validity and enforceability of the maritime lien over third parties.

Furthermore, other issues, such as the application of the Brussels Convention and the Bustamante Code are also discussed under this matter, since they would in theory recognize the validity and enforceability of foreign maritime mortgages in Brazil. However, the Court of Appeals of São Paulo has recently rendered a decision rejecting the validity of foreign maritime mortgages in Brazil.

Additionally, the enforcement of a foreign mortgage may only take place if the Brazilian courts are competent, as per Article 21 of the new Brazilian Civil Procedure Code:

“Art. 21. Its for the Brazilian judicial authority to prosecute and judge the actions that:

I - the defendant, whatever his nationality, is domiciled in Brazil;

II - the obligation is to be performed in Brazil;

III - the fact which gave rise to the claim results from a fact occurred or an act performed in Brazil.

Sole Paragraph. For the purpose of item I, A company is considered domiciled in Brazil, when that company has an agency, branch or subsidiary located here”.

7.2 Is it necessary for the mortgagee to obtain a judgment in your jurisdiction on its claim under the loan agreement or other applicable debt instrument before it can enforce that mortgage?

In Brazil a mortgage is considered an extrajudicial title and, therefore, the creditor would be able to file an enforcement lawsuit, requesting an immediate payment order, under the penalty of attachment and sale of the goods in case the debtor does not pay.

7.3 If so, how long is it likely to take to obtain a judgment if the claim is contested? Will the local court expedite the proceedings having regard to the ongoing costs of maintaining the vessel?

If the claim is challenged, the estimate time for a decision is two years. However, in view of the costs and risks of having a vessel under arrest, it might be possible to anticipate the sale of the vessel.

7.4 Will the court in your jurisdiction accept jurisdiction for the mortgage claim under Article 7 1952 Arrest Convention, or equivalent domestic legislation in your jurisdiction?

No, because Brazil has not ratified any Arrest Conventions.

8. JUDICIAL DECISIONS AND APPEALS

8.1 Do all courts in your jurisdiction have authority to sell vessels free of maritime liens and prior claims, or is such authority limited to special courts, such as admiralty courts?

Yes, all courts in Brazilian jurisdictions have authority to sell vessels free of maritime liens and prior claims.

8.2 What formalities, including evidence of claim, or evidence of notice, are required to affect the sale of a vessel free of liens and prior claims?

The court shall determine the judicial sale of the vessel, which shall happen through a judicial auction. In order to do so, the Court is required to issue a notice in respect to the judicial sale, which will be put on the Courts wall and it will also be published in a major local newspaper.

8.3 If the owner presents an appeal against judgment, will the court make an order for sale of the vessel before that appeal has been heard and decided?

The appeal may have a suspensive effect and, therefore, the possibility of selling the vessel would be suspended until a decision is rendered by the Court of Appeals. However, usually arrest and injunction cases have only remanding effect and, therefore, it would be possible to proceed with the sale (and probably the payment of a guarantee would be requested).

9. SALE PROCEDURE

9.1 Can a mortgagee enforce his mortgage in your jurisdiction by applying for a judicial sale by auction?

Yes, he can apply for a judicial sale by auction.

9.2 What are the criteria for an application for a judicial sale by auction and what is the procedure and timetable for such an application and sale?

Mortgages on ships are enforced through judicial actions and a forced sale at public auction (asset biddings) – which can be proposed by the mortgagee. And in order to be able to seek the judicial sale of the vessel, the creditor needs to have a previous final court decision for subsequent enforcement. In case the mortgage is over a foreign flagged vessel, creditor will need to follow the steps for the enforcement in Brazil of the foreign judicial decision/arbitral award that recognizes its credit and lien.

The bidding acts are conducted by the public auctioneer in the course of a judicial proceeding, who will adopt all necessary formalities to conduct the auction and sell the vessel under a commission that may vary between two to five percent of the sale price.

A minimum initial bid will be indicated by the judge based on the accounting report and the vessel will not be sold at the first auction in case the minimum price is not reached. However, in a second auction, which will take place between 10 and 20 days after the first one, the vessel may be sold for any price provided it is not considered a vile amount by the Court (there is no legal definition of vile amount as this varies depending upon the circumstances of the matter. But, there is a certain jurisprudence setting out a limit of 40% of the appraised value).

The order of sale usually requires that the highest bidder deposit 20 percent of the bid in cash or by certified check immediately following the auction, with the balance to be paid within a certain number of business days. If the residual amount is not paid, the auction may be aborted and the vessel offered to the next bidder.

Once the sale is duly performed, the judge will release an order of sale and the bidder will register ownership of the vessel at the Maritime Court, free of any encumbrances.

When different privileged creditors disputes the product of the judicial sale, the release of the deposit made by the bidder will respect the ranking of priorities and the chronology of the respective judicial attachments. The Court will render a decision with the final order to be respected for creditor payments.

9.3 Will the court in your jurisdiction order a sale of the vessel pending judgment (pendent lite), recognising that the vessel is a wasting asset?

If the vessel is deteriorating or causing danger to other vessels, or to the environment, the judge may anticipate the sale.

9.4 Will the court in your jurisdiction fix a minimum bid price (reserve price) for the vessel and will the amount of that minimum bid price be disclosed to interested parties? What happens if the maximum amount bid for the vessel is lower than the reserve price?

The judicial sale of vessels follows the same general rules as asset bidding. The minimum initial bid is set by the judge based on the accounting evaluation report. The vessel cannot be sold at the first auction for an amount below its official appraisal. However, at the second auction (10 to 20 days after the first auction), the vessel may be sold at any price that the court considers proper (within a limit of 40 per cent of the appraised value).

9.5 Can the owner or other creditors influence the amount of the reserve price?

The parties may disagree with the amount and impugn the amount. The matter will be decided by the judge or in a new assessment.

9.6 What arrangements will be made for public advertisement of the sale?

In the judicial sale, the Judge will issue a notice that will be put on the Courts wall and it will also be published in a major local newspaper.

9.7 To what extent is it possible for the owner or other creditors to influence the timetable or procedure for sale?

Taking into account the low pace of Brazilian Courts, as well as the high level of red-tape, the parties may delay the development of the case by presenting several questionings and appeals.

9.8 Can a mortgagee enforce its mortgage in your jurisdiction by applying for a court approved private sale? If so, what are the criteria for an application requesting the court to approve a private sale and what is the procedure and timetable for such an application and sale?

The creditor may opt for the private sale of the good, as per Article 879 of the new Brazilian Civil Procedure Code.

The creditor may request the private sale to the Court by its own initiative or by an accredited broker. The judge will fix a term within which the sale must be effected, the way it shall be published, the minimum amount, the payment conditions, any guarantees and broker commission.

It can be formalized in the proceedings, signed by the judge, the judgment creditor, the purchaser and, if present, the debtor. A letter informing the sale will be issued to the Real Estate Registry, or, if movable, delivered sent to purchaser.

Local courts may issue local regulations detailing the private sale procedure and on the accreditation of brokers.

9.9 Can a mortgagee bid its debt (animo compensandi) so as to allow a set off of the debt against the purchase price (and provide security for the claims of potential prior lien holders)? Or does a mortgagee (or its preferred bidder or buyer) have to pay the full price in cash?

Although there is no legal provisions on this matter, we understand that the mortgagee would not be able to bid its debt with another credit, in order not to prejudice the interests of other creditors.

10. SALE PROCEEDS

10.1 Will the sale proceeds be held in an interest bearing account?

The sale proceeds will be deposited in a judicial account, in which, usually, is applied indexation and interest rate (the criteria varies according to each State).

(a) Will they be held in the currency of the sale or will they be converted into local currency?

The payment at court will be always in local currency – Brazilian Reais.

(b) Will the proceeds of sale ultimately be subject to any exchange control or similar restrictions (and/or court fees) when they are paid out? If so, what is the procedure and likely timetable for obtaining permission to remove the funds?

The amount deposited in a judicial account cannot be directly remitted abroad. It will have to be, first, transferred to an account in Brazil and then remitted abroad. And this transfer will need prior authorization from the Central Bank in Brazil – the judicial decision would justify this remittance to the Central Bank. This is a red-tape procedure that usually take 20 days.

11. PRIORITIES GENERALLY

11.1 Are priorities determined under local law (lex fori), or the law of the jurisdiction in which the claim arose (lex causae), or the law of the flag of the vessel?

Priorities are determined according to local law.

11.2 If local law, where does the mortgagee rank amongst other maritime claims in the order of priority and which are those claims which rank prior to the mortgagee. Do the claims which rank ahead of a mortgage in your jurisdiction vary depending on whether the mortgage is:

(a) a mortgage of a vessel registered under the laws of your jurisdiction?

The following maritime claims rank prior to mortgage:

1. Federal taxes;
2. Legal costs and expenses;
3. Claims resulting from the employment of Master, crew and ship personnel;
4. Indemnities due for salvage;
5. General Average contributions;
6. Obligations undertaken by the Captain outside the port of registry for maintenance needs or continuation of the voyage;
7. Indemnities due as a result of collisions, or any other sea accident.
8. Ship mortgages.

(b) a mortgage of a vessel registered under the laws of a different jurisdiction?

A mortgage of a vessel registered in a different jurisdiction may not, in theory, be recognized in Brazil, since, to be considered valid, it is required its registration before the Admiralty Court. However, as previously mentioned, this is still a controversial matter. In case it is recognized, it will rank in the same way as indicated in letter (a) above.

11.3 Are there any special rules on priority for local creditors?

There are no special rules on priority for local creditors.

11.4 Is it necessary for claimants to introduce their claims prior to the date of sale or within some specified period thereafter?

The claims may be presented within the time bar, therefore it may be before or after the sale. However, after the sale there is the risk of no longer having assets or securities as collateral. Claims presented after the sale may be over the credit obtained with the sale while it is still deposited in the judicial account.

11.5 What is the timetable leading up to the distribution of the proceeds of sale?

After the payment, in case it is not challenged, distribution of the proceeds of sale may take 20 days, since it is necessary to await the decision to become final.

11.6 Is the distribution order decided by the court?

The distribution of the amount may only be effected with a Court order. Once the sale is duly performed, the judge will release an order of sale and the bidder will register ownership of the vessel at the Maritime Court.

When different privileged creditors dispute the product of the judicial sale, the release of the deposit made by the bidder will respect the ranking of priorities and the chronology of the respective judicial attachments.

11.7 Is that order subject to a right of appeal?

The order which authorizes the distribution of the proceeds should not be subject to an appeal, since it only takes place after the decision became final and unappealable. Additionally, the order of the priorities among creditors is not determined by the court, but by law.

12. MORTGAGEE'S SELF-HELP REMEDIES

12.1 Under the laws of your jurisdiction does a vessel mortgage governed by and registered in accordance with such laws give the right to take the following enforcement steps without a court order in your jurisdiction?

(a) to take possession of the vessel;

No, it is not possible. In Brazil, mortgages on ships are only enforced through judicial actions and through forced sales at public auctions. There are no self-help remedies.

(b) to appoint a receiver, manager or other party to operate the vessel;

No. The appointment of a receiver/manager, who would be in charge of keeping the good, would have to be made by Court.

(c) to sell the vessel as mortgagee;

Private sale of the vessel would only be possible after a judicial order in this sense. The creditor may request the private sale to the Court by its own initiative or by an accredited broker. The judge will fix a term within which the sale must be effected, the way it shall be published, the minimum amount, the payment conditions, any guarantees and broker commission.

(d) to sell the vessel as attorney in fact of the owner.

[Answer]

In Brazil, the owner, or the attorney in fact of the owner, of a mortgaged vessel does not need a court order to sell the vessel. He is allowed to sell it without the consent of the mortgagee, since the goods keeps its mortgage regardless of who is the owner. The lien follows the mortgaged good.

However, it is important to highlight that, although legally there is no impediment to the owner to sell a vessel which is subject to a security interest, contracts terms may require the previous authorization to sell the vessel. This is quite common under financing contracts, in which the financing agent will have to authorize the sale of the secured vessel by the owner.

12.2 If, under the law of the ships' register (where that is a different law from the law of your jurisdiction) a mortgagee is given the right to take the enforcement steps referred to at (a) – (d) of 11.1 without a court order would its right to do so be recognised or prohibited in each case in respect of a vessel physically located in your jurisdiction?

The following answer applies to letters "a" to "c".

In Brazil the creditor is not entitled to any self-help remedies right, having to resort to the judicial courts. Considering that this would be a foreign mortgage, the creditor might face some difficulties in the enforcement of it in Brazil, without a foreign court order, since the validity of foreign maritime

liens in Brazil is still controversial, as previously mentioned. This would apply for the circumstances of taking possession of the vessel, appointing a receiver/manager or in the case of private sale by the mortgagee.

In respect specifically to letter “d”, in Brazil, the owner, or the attorney in fact of the owner, of a mortgaged vessel does not need a court order to sell the vessel. He is allowed to sell it without the consent of the mortgagee, since the goods keeps its mortgage regardless of who is the owner. The lien follows the mortgaged good. However, considering that the registry of the vessel is foreigner, this issue would need to be in accordance with the local law of the registry.

12.3 Where answers to the questions in 11.2 are negative would the answers be different in each case if a court order were obtained in the jurisdiction of the ships' register?

[Answer]

The follow answer shall apply to letters “a” to “d”.

In order to enforce the mortgage decision in Brazil, the creditor would need to validate the foreign documents and to enforce the foreign judicial decision/arbitral award through the ratification procedure before the Superior Court of Justice in Brazil. In summary, it is a ratification by the Superior Court of Justice, which takes place as long as certain formal requirements are met, including the absence of any provisions contrary to the Brazilian legal order, public order, national sovereignty and good moral conduct.

13. INSOLVENCY PROCESSES³

13.1 Has your jurisdiction adopted the UNCITRAL Model Law on Cross-Border Insolvency?

Brazil has not adopted the UNCITRAL Model Law on Cross-Border Insolvency.

13.2 Do the laws of your jurisdiction provide for recognition of foreign insolvency proceedings? (if the UNCITRAL Model Law has been adopted, in addition to its provisions)

Considering that Brazil has not adopted the UNCITRAL Model Law on Cross-Border Insolvency, any foreign insolvency proceedings shall not be immediately recognized within Brazilian Jurisdiction.

In order to be valid and enforceable in Brazil, any foreign decision must previously scrutinized and ratified by the Superior Court of Justice – STJ.

Further to that, Brazilian Insolvency Act (Federal Law nº 11.101/05) establishes that Brazilian Courts have exclusive jurisdiction for conducting the insolvency proceedings of a Brazilian Company. In this sense, even though there is a foreign insolvency proceeding in course, the Company under insolvency regime should request the insolvency of its own branch/subsidiary before the Brazilian Courts.

13.3 Do the laws of your jurisdiction provide that the enforcement of rights of secured creditors (such as the mortgagee of a vessel) can be stayed or suspended during applicable insolvency proceedings?

³ If your jurisdiction is subject to the EU Insolvency Regulation and will be subject to the 'Recast' EU Insolvency Regulation, please so indicate – but also respond to the questions.

As a consequence of the insolvency proceedings in Brazil, further to the submission of the insolvency request or conversion of court-supervised restructuring into insolvency proceedings and the analysis of its requirements, the Judge shall order the suspension of all claims, lawsuits or expropriation of assets, except for tax cases and other cases where credits are being liquidated, shall be suspended (stay period) so that the company insolvency would be able to calculate the total debt amount and the total of assets and rights subject to its sale for the payment of the creditors.

In this sense, even the secured creditors shall be forbidden to request/proceed enforcement of their rights during the stay period.

13.4 Is the answer to 12.3 different if the insolvency proceedings did not originate in your jurisdiction but are foreign insolvency proceedings (being recognised in your jurisdiction by whatever means)?

In general, any foreign decision must be previously scrutinized and ratified by the Superior Court of Justice – STJ in order to be valid and enforceable in Brazil.

However, even when the mortgage/credit rights are not ratified by the Superior Court of Justice, the creditors shall be entitled to request the inclusion of their credits in the creditors list of the insolvent company. In this scenario, the recognition of the credit and also its classification, secured or unsecured, will be subject to the Judicial Administrator discretion and/or Judge's discretion should the Judicial Administrator rejects the request for inclusion of credits.

13.5 If the mortgage over a vessel located in your jurisdiction is being enforced through a maritime court sale in circumstances where the owner of the vessel is subject to insolvency proceedings in your jurisdiction, do the maritime court sale proceedings take precedence over the insolvency proceedings, or vice versa?

Brazilian Maritime Courts jurisdiction is limited to the judgment of navigational incidents/ facts and registration of vessel ownership. In this sense, Brazilian Maritime Courts have no jurisdiction for the enforcement of maritime mortgages or sale of vessels, which both shall be subject to State Courts of Federal Courts.

Further to that, the Judge in charge for the insolvency proceedings has exclusive jurisdiction for the enforcement of any mortgage or expropriation of any insolvent company's asset, including vessels.

In this sense, the insolvency proceedings shall prevail over any other proceeding.

13.6 Is the answer to 12.5 different if the insolvency proceedings did not originate in your jurisdiction but are foreign insolvency proceedings (being recognised in your jurisdiction by whatever means)?

Any foreign decision must be previously scrutinized and ratified by the Superior Court of Justice – STJ in order to be valid and enforceable in Brazil.

In this sense, no decision rendered in a foreign insolvency proceedings or maritime court shall be immediately enforceable in Brazil for the expropriation of a Brazilian asset or asset owned by a Brazilian subsidiary/branch.

13.7 If a vessel is sold in your jurisdiction through a maritime court sale is the mortgagee's claim to the sale proceeds subject to the risk of the mortgage being challenged or set-aside by applicable insolvency claw-back rules for transactions prior to insolvency?

As mentioned above, Brazilian Maritime Courts do not have jurisdiction for the enforcement of mortgages and sale of vessel.

Brazilian Insolvency Law (Federal Law nº 11.101/05) establishes a period prior to the request for insolvency which all the negotiations performed by the company shall be subjected to an investigation to be conducted by the Judge so that the Judge may discover any fraudulent act or which jeopardize creditors' rights and order its revocation.

In this sense, should any asset is sold by the insolvent company during such period or should such sale is performed, even prior to the commencement of the insolvency proceeding, with fraudulent purpose (i.e. in order to privilege certain creditors, avoid the payment of credits and etc) or not, such sale will be subject to its challenge by the creditors, Public Prosecutor and the Judicial Administrator.

However, should the vessel's sale be pre-registered before the Maritime Court and its final registration be performed prior to the request for insolvency or during the insolvency proceedings, vessel's sale shall be recognized as valid since the final registration shall be deemed as a mere formality for the conclusion of the sale and not the sale itself.

13.8 Is the answer to 12.7 different if the insolvency proceedings did not originate in your jurisdiction but are foreign insolvency proceedings (being recognised in your jurisdiction by whatever means)?

Any foreign decision must be previously scrutinized and ratified by the Superior Court of Justice – STJ in order to be valid and enforceable in Brazil.

In this sense, no decision rendered in a foreign insolvency proceedings or maritime court shall be immediately enforceable in Brazil for the expropriation of a Brazilian asset or asset owned by a Brazilian subsidiary/branch.

13.9 Do the insolvency courts of your jurisdiction have, or claim, extraterritorial jurisdiction, such as over vessels located in a different jurisdiction? If so, how?

Brazil has not adopted the UNCITRAL Model Law on Cross-Border Insolvency and, therefore, Brazilian insolvency Courts jurisdiction and effects of insolvency proceedings in course in Brazil shall be limited to Brazil.

14. LEASING⁴

⁴ By 'leasing' is meant a demise chartering of a vessel where the holder of legal title ('lessor') is a financier rather than a commercial shipping company and the vessel is demise chartered to a shipping company ('lessee'). It might or might not involve the lessee having an option to purchase for a pre-agreed price or title automatically passing to the lessee

14.1 In your jurisdiction is leasing of vessels common as a method of financing?

Although not expressly provided for by law, leasing operations/contracts are common in Brazil. However, leasing operations of ships are not very common, although they do exist. Usually vessels are acquired by other means of financing and instead of a mortgage BNDES and Banco do Brasil prefer to guarantee such loans to obtain a fiduciary alienation (a type of chattel mortgage) of the vessel. The fiduciary alienation is not a leasing but the ownership of the vessel remains with the Bank until the loan is paid.

14.2 Do the laws of your jurisdiction give effect to a lease in accordance with the form of the document (formal approach) or is there a risk they will re-characterise certain leases as security interests (functional approach)?

Brazil adopts a form approach, considering a leasing agreement as a lease, based on the form of the document, and being the lesser the real owner of the good.

14.3 If the laws of your jurisdiction adopt a functional approach (13.2) please describe briefly how this is applied; also, please say whether your courts would adopt a functional approach even where the governing law of the lease follows the formal approach.

N/A

14.4 Do the laws of your jurisdiction permit the parties to the lease of a vessel governed by that law to expand by contract the rights and remedies of the lessor on default by the lessee? Or are such rights and remedies provided for exclusively by law?

Assuming that the contract is governed by Brazilian law, all the rights and remedies are provided by law.

14.5 Do the rights and remedies of the lessor of a vessel include steps to terminate the leasing and re-take possession of the vessel through self-help or is this only possible in your jurisdiction with the assistance of the court?

The termination of the contract can take place in the following circumstances: death of the lessee, unexpected circumstance or force majeure, conclusion of the contract, perishing of the good or due to a breach of one of the parties' obligations.

In these cases, the lessor is able to re-take possession of the vessel through self-help.

14.6 Under the laws of your jurisdiction is a leased vessel considered to be an asset of the lessor or the lessee, or both?

In Brazilian jurisdiction, the vessel under a leasing agreement will be considered to be an asset of the lessor (the creditor has the vessel ownership), while the lessee only has the use and enjoyment of the asset.

14.7 Under the laws of your jurisdiction what impact would an insolvency process (or different processes) in respect of the lessee have on the rights and remedies of the lessor of a vessel? Is this affected by the type and terms of the lease?

In case of insolvency of the lessee, the ownership of the goods remains with the lessor and, therefore, will not compose the lessee remaining assets. Additionally, insolvency does not extinguish the leasing agreement, unless otherwise provided for in the contract.

Furthermore, the leasing agreement may be considered as an extrajudicial enforcing instrument in case of default in payments by the lessee. In this case, the lessor may enforce its rights by terminating the contract with the right to damages, as well as by repossession of the goods.

14.8 Under the laws of your jurisdiction can a lessor arrest a vessel which it leases? Can it join in arrest proceedings initiated by a third party?

Since the ownership of the vessel under a leasing agreement will be of the lessor, there is no need for him to arrest it.

14.9 Under the laws of your jurisdiction what priority is given to the rights of a lessor of a leased vessel as against third parties with maritime liens/claims?

The lessor has the ownership of the vessel and does not lose it in case of insolvency. The goods will not compose the lessee remaining assets, as indicated above. Therefore, the lessor does not need to apply to the collective insolvency procedure and does not need to follow the priorities order.

14.10 Do the laws of your jurisdiction recognise registered leases in respect of vessels registered in a different jurisdiction? If so, please give brief details.

Similarly to the mortgage issue, it is not possible to register in Brazil a lease agreement over a vessel registered in a different jurisdiction. The Brazilian Admiralty Court is only competent towards Brazilian-flag vessels and, as a consequence, may not proceed a register over a foreign-flag vessel. However, as previously mentioned, the recognition of foreign maritime liens in Brazil is still controversial. It can be argued that the leasing agreement might be registered before the Notary of Titles and Documents, in order to gain validity and enforceability in Brazil, towards third parties. But since this is still controversial, it is not guaranteed.

14.11 In your jurisdiction is there generally a wish to promote leasing of vessels, including by reforming the law? If so please provide a brief explanation.

Leasing contracts concerning vessels are not very common in Brazil. We understand that this is due to some Regulatory Aspects in Brazil, as well as due to the high liability of a vessel's owners (such as environmental liability) and the lack of interest of banks in assuming such liabilities. It has not been verified a wish to enhance this practice. Charter mortgages, on the other hand, are more common, specially under financing agreements.

15. RESERVATION OF TITLE⁵

15.1 Do the laws of your jurisdiction treat the holder of title under reservation of title as the holder of a security interest?

When registered before the General Register of Properties, the title under a reservation of title is considered to be a security interest, as per article 1.417 of the Brazilian Civil Code. However, it is important to note that, considering that the asset is a vessel, the registry shall be effected before the Maritime Notary.

15.2 Do the laws of your jurisdiction provide for reservation of title arrangements to be registered in the ships' register in any way different from a standard registration of the holder of title as registered owner? If so, please give brief details.

The reservation of title arrangement shall be register first before the Maritime Notary, as general registration. Then it shall be presented before the Admiralty Court, just to make a note of it on the ownership document of the vessel.

15.3 If the laws of your jurisdiction do provide for reservation of title arrangements to be registered as referred to in 14.2, what rights and remedies are given to the holder of title?

N/A

15.4 Do the laws of your jurisdiction recognise foreign reservation of title arrangements of a type referred to in 14.2? If so, please give brief details of how these arrangements would be recognised.

In order for a foreign reservation of title agreement to be registered before the Maritime Notary, it shall comply with the following requirements: (i) it must be notarized; (ii) it must be consularized; (iii) it must be translated by a sworn translator; (iv) it must have the signatures dully notarized; and (v) it must be previously registered before the Registry of Titles and Documents.

⁵ References to 'reservation of title' are intended to include arrangements where a seller retains title to the vessel until the buyer pays the full price in circumstances where the buyer's obligation to pay the full price is deferred over time.